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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LONNIE YATES,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this case is ripe for review when petitioner has not yet been sentenced.

Whether petitioner may ask that the prosecution's use of peremptory challenges be reviewed in a case in which there was no intent or motive to exclude members of minority groups from the jury, and in fact minority group members did serve as jurors.

Whether this Court should abandon its holding in the Swain decision and its holdings in the many cases adopting and restating the principle of the Swain decision.

Whether this Court should abolish or limit the use of the peremptory challenge by requiring review of the prosecution's use of peremptories in each individual case.

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Respondent, the People of the State of Illinois, respectfully request that this Honorable Court deny the Petition for Writ of Certiorari filed in this matter.

OPINION BELOW

The relevant opinion and order of the Supreme Court of Illinois are reproduced in the appendices to the petition for a writ of certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. sec. 1257(3). As set forth below, petitioner has not given sufficient reasons for this Court to grant a writ of certiorari. In addition, 28 U.S.C. sec. 1257(3) provides only for review of "Final judgments or decrees rendered by the highest court of a State in which a decision could be had...." There is no final judgment in this case under Illinois law, as petitioner has not yet been sentenced. The sentence to be imposed is relevant to petitioner's contentions

in this Court. Therefore petitioner improperly seeks to invoke the jurisdiction of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner has set forth the constitutional provisions on which he relies in his petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

THIS CASE IS NOT RIPE FOR REVIEW AS PETITIONER HAS NOT YET BEEN SENTENCED, AND IT IS NOT KNOWN WHETHER PETITIONER WILL BE SENTENCED TO DEATH.

The Illinois Supreme Court affirmed petitioner's convictions for murder and burglary, but vacated the death sentence and remanded the case for resentencing. On remand petitioner may again be sentenced to death, or he may be sentenced to imprisonment for as much as natural life or for as little as twenty years. Ill. Rev. Stat. 1981, Ch. 38, secs. 1005-5-3(c)(1), 1005-8-1 (a)(1).

Petitioner has prematurely sought review by this Court before he has been sentenced. Conceivably petitioner could be satisfied with the sentence he will receive on remand and will not seek a retrial. More importantly, petitioner attacks jury selection in this case on the grounds that a special rule should apply in death penalty cases. (Pet., p. 6) Therefore it would be premature for this Court to grant review before it is determined whether this is actually a death penalty case.

The relevant provision of the United States Code permits review by writ of certiorari only from "final judgments" of a state's highest court. 28 U.S.C. sec. 1257(3). In Illinois the final judgment in a criminal case is the sentence, so there has been no final judgment in this case. People v. Biederman, 100 Ill. App. 3d 558, 426 N.E.2d 1225 (2d Dist. 1981). It is true in some cases there may be a final judgment on a federal question even when there is a remand in state court for resentencing. Brady v. Maryland, 373 U.S. 83, 85 fn. 1 (1963). This is not such a case. Petitioner argues that there is a special rule of constitutional law applying to jury selection in death penalty cases. Until petitioner either is or is not sentenced to death there is no final judgment in state court on that question.

If petitioner is again sentenced to death on remand, a further appeal to the Illinois Supreme Court is automatic. Ill. Supreme Court Rule 606(a), Ill. Rev. Stat. 1981, Ch. 110A, sec. 606(a). Then petitioner would have standing to assert his claim that a special rule applies to the use of peremptory challenges in death penalty cases. But unless petitioner is in fact sentenced to death, his contention is simply not ripe for review.

II.

MINORITY JURORS WERE NOT EXCLUDED FROM THE JURY IN THIS CASE.

It has been well established law since 1965 that the parties in a criminal case may use their peremptory challenges as they see fit. Swain v. Alabama, 380 U.S. 202 (1965). Petitioner suggests that this Court reopen this question and completely change the law. Respondent's position is that there is no good reason to abandon stare decisis on this issue. (See Sections III, IV) But, even if this Court were to reopen the question of the use of peremptory challenges against minority jurors, it would be appropriate to do so only in a case in which minorities had been clearly excluded from a jury. This is not such a case. The record in this case establishes that the prosecutors had no intent to exclude minority jurors, and that in fact one black juror and one Latino juror served on the jury which convicted and sentenced petitioner.

In other words, even if Swain were to be reconsidered, this is the wrong case in which to do it. This Court would find itself in the position of trying to make a factual determination concerning the motives of the prosecutors in their use of peremptory challenges.

The first prospective juror questioned by the trial court was Roger Peterson, who everyone agrees was black. (T.R. 1251, 1637-1638) He was accepted by both sides and served on the jury. The fact that he was the first prospective juror examined shows that the prosecutors had no intent to exclude black people from the jury. When they accepted Mr. Peterson, the prosecutors had no idea how many more black people they would find it desirable or necessary to accept as jurors.

Later both sides accepted a certain Mr. Sizemore as a juror, even though his race was not determined until this matter was on appeal. Concerning Mr. Sizemore, one of the prosecutors said (T.R. 1638):

> I don't know what his ethnic background is. He might be black, he might be Mexican. He might be something else. I don't know.

Later, while this matter was on appeal, the defense attorneys had Mr. Sizemore subpoenaed into the trial court to testify concerning his race. He said that he considered himself white and that his father was from Tennessee and his mother

was from Mexico. (Sup. Rec. 24) But it is clear that the prosecutors did not know what racial or ethnic group Mr. Sizemore belonged to when they accepted him, which is another indication that there was no intent to exclude minority jurors from service in this case.

The prosecutors in this case asked the jury to convict petitioner of murder, largely on the testimony of two black eyewitnesses. Then they asked the same jury to approve a death sentence for the murder of a black victim. The prosecutors had no motive or intent to exclude black people from the jury.

This case illustrates the problems that would be created by a requirement that the use of peremptory challenges in a criminal case be reviewed. Judges would have to attempt to read the minds of trial attorneys and evaluate the numerous subjective factors that determine the use of a peremptory challenge. In addition, judges would have to make arbitrary decisions concerning the racial and ethnic background of prospective jurors.

In any event, even assuming for the sake of argument that the Swain decision were to be reconsidered, this is not a proper case in which to do so. The record indicates that there was no intent to exclude racial minorities from the jury, and that minority jurors were not in fact excluded.

III.

THIS COURT HAS CONSISTENTLY ADHERED TO THE PRINCIPLE OF SWAIN V. ALABAMA.

In the Swain decision this Court held that, while systematic racial discrimination in jury selection is unconstitutional, the use of peremptory challenges by the prosecution in an individual case is not subject to review. Swain v. Alabama, 380 U.S. 202 (1965). Since 1965 this Court has repeatedly endorsed the principle of Swain.

The Swain decision was cited as a binding authority in Regents v. Bakke, 438 U.S. 265, 319 fn. 53 (1978), Apodaca v. Oregon, 406 U.S. 404, 413 (1972), and Carter v. Jury Commission, 396 U.S. 320, 323 fn. 2 (1970). In Apodaca, which involved the application of the Sixth Amendment to state court proceedings, this Court restated the principle of Swain. 406 U.S. at 413. And in a footnote to the Bakke opinion this Court stated that a prosecutor may take ethnic background into account in picking a jury, and it is assumed that in doing so he has a lawful and legitimate purpose. 438 U.S. at 319 fn. 53.

The most significant restatement of the principle of Swain was in Taylor v. Louisiana, 419 U.S. 522 (1975), a leading Sixth Amendment case. In Taylor this Court held that systematic exclusion of women from the panels from which juries are chosen is unconstitutional, but made it clear that this principle did not apply to the selection of any particular jury. This Court said:

> It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition. (419 U.S. at 538) (emphasis added).

Similar language may be found in City of Mobile v. Bolden, 446 U.S. 55, 77 fn. 24 (1980).

Thus this Court has consistently held that the Sixth Amendment does not require that a trial judge in a criminal case try to examine the motives of the prosecutors for their use of peremptory challenges. This Court has therefore rejected whatever criticisms have been made of the Swain decision, and that precedent remains good law.

As petitioner notes, this Court has refused to reopen the questions which were decided in Swain. McCray v. New York, cert. denied at 103 S.Ct. 2438 (1983). In McCray three justices, joining in the denial of certiorari, expressed the hope that the states would serve as laboratories for the study of this issue. Petitioner incorrectly asserts that Illinois is not serving as a laboratory. In fact Chief Justice Howard C. Ryan of the Illinois Supreme Court, in his annual report to the state legislature, recommended that the number of peremptory challenges in criminal cases be reduced. This, Chief Justice Ryan suggested, would reduce or eliminate the possibility that minority jurors might be excluded from criminal juries. Chicago Daily Law Bulletin, February 6, 1984, pp. 1, 16. Chief Justice Ryan's recommendation shows that Illinois is studying this question and considering means of dealing with the issue.

Currently Illinois follows, not just this Court's holding in Swain, but also the later decisions in which this Court has endorsed and restated that rule. Petitioner has not presented any valid reasons why this Court should reject its own well-established rule of law.

IV.

THIS COURT'S HOLDING IN SWAIN SHOULD STAND, AS ANY CHANGE IN THAT RULE WOULD OBSTRUCT RATHER THAN PROMOTE THE CHOOSING OF FAIR AND IMPARTIAL JURIES.

This Court should not reconsider the rule it has followed in Swain and many subsequent decisions. Swain v. Alabama, 380 U.S. 202 (1965). The courts in most states have relied on those holdings in formulating their rules of criminal procedure. Furthermore, any change in Swain would make jury selection in criminal cases much more complicated, but would, if anything, make it more difficult to choose fair and impartial juries.

The holding in Swain is firmly rooted in the realities of trial practice. Nothing is more difficult to explain than why a trial lawyer has exercised a peremptory challenge in an individual case. As this Court noted in Swain, peremptory challenges are frequently exercised because of things which cannot be of record, such as hunches, body language or tone of voice. 380 U.S. at 220-221. Picking a jury is an art, not a science, and often the reasons for exercising a peremptory challenge will not be fully known, even to the attorney who has exercised it. Nothing would be more difficult on which to conduct a hearing than the question of why a trial lawyer has challenged particular jurors in an individual case.

In fact if petitioner's argument on this issue were accepted, the result could greatly increase the complexity of the jury selection process but the juries actually chosen would be less fair and impartial than those selected now. Every time a jury is selected, some groups will have no representation on it. As Justice William O. Douglas once said, ". . . in our pluralistic society, a group of 12 men and women could not possibly represent all of the ethnic, racial and economic groups which compose our diverse culture." Donaldson v. California, 404 U.S. 968, 972 (1971) (Douglas J., dissenting from denial of certiorari). Therefore, in every jury trial in a criminal case a defendant would be able to demand a hearing on the grounds that some racial, ethnic, sexual, occupational, or residential group had been excluded from the jury. Once the demand was made, the prosecution would then have to explain their use of peremptory challenges, thus in effect converting them into challenges for cause.

The peremptory challenge has been one of the principal instruments used by both the prosecution and the defense to remove actually biased individuals from juries. Petitioner would greatly limit or abolish the use of peremp-

tory challenges by the prosecution. The result might also be to limit the use of peremptory challenges by defendants, as well. As courts in California and Massachusetts have recognized, once the use of peremptory challenges by the prosecution is limited, fair trial practice would require that similar limitations be imposed on the defense. Commonwealth v. Soares, 387 N.E.2d 499 (Mass. 1979); People v. Wheeler, 583 P.2d 748 (Cal. 1978). Individual states may choose to restrict or eliminate the peremptory challenge, a change in procedure which would probably work to the advantage of prosecutors. But there is no support in law or logic for petitioner's argument, which in effect is that the Sixth Amendment requires that true peremptory challenges be abolished.

A remedy already exists for systematic discrimination against minority prospective jurors during jury selection in criminal cases. As the Illinois Supreme Court stated, if a defendant can prove systematic discrimination in case after case, then that defendant would be entitled to a remedy. Defendants have attempted to prove systematic discrimination and have obtained a remedy in reported cases. State v. Washington, 375 So.2d 1162 (La. 1979); State v. Brown, 371 So.2d 751 (La. 1979); United States v. Robinson, 421 F.Supp. 467 (D.C. Conn. 1976), reversed, 549 F.2d 240 (1st Cir. 1977) (where statistical data over a period of time was offered but ultimately held insufficient to prove systematic discrimination).

It has been asserted that few defendants would have the time or money necessary to attempt to prove systematic discrimination. Since petitioner never even attempted to prove systematic discrimination in the state courts, he should not be heard to claim that proof of systematic discrimination would be difficult. After all, there are many reported decisions in which elaborate statistical data was presented on the composition of jury panels. These decisions include Donaldson v. California, 404 U.S. 968 (1971); United States ex rel. Barksdale v. Blackburn, 639 F.2d 1115 (5th Cir. 1981); Ross v. Wyrick, 581 F.2d 172 (8th Cir. 1978); and Dixon v. Hopper, 407 F.Supp. 58 (M.D. Ga. 1976). Similar data could be compiled on the racial composition of juries, but petitioner has not presented any such data.

Whatever may be the case with other defendants, petitioner has the ability to compile data on how peremptory challenges are actually used in Cook County, Illinois. He has been represented at trial and on appeal by the Cook County Public Defender's Office, which has representatives in every criminal courtroom in Cook County. Respondent asserts that juries in Chicago and the rest of Cook County are chosen in a lawful manner. Since petitioner has not

even attempted to prove otherwise, he has not met the burden imposed on him by law for an attack on the prosecution's use of peremptory challenges.

In conclusion, unless there is proof of systematic discrimination, the parties in a criminal case should be allowed to use their peremptory challenges as they see fit. Any other rule would limit or abolish the peremptory challenge, which has been an instrument used by both prosecution and defense to remove biased individuals from juries.

CONCLUSION

Respondent, the People of the State of Illinois, respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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